In forma pauperis
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Office - Supreme Court, U. S.
FILED
OCT 31 1941
CHARLES ELMORE CROPLEY
CLERK

No. 684

IN THE

Supreme Court

OF THE

UNITED STATES

314-675

LETTIE M. McGOLDRICK,
Petitioner,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,
Respondent.

BRIEF OF RESPONDENT THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI AND AFFIDAVIT OPPOSING MOTION TO PROCEED IN FORMA PAUPERIS.

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E. D. WELLER,
Spokane, Washington,

C. R. EBERHARD,
LaGrande, Oregon,
Attorneys for Respondent.

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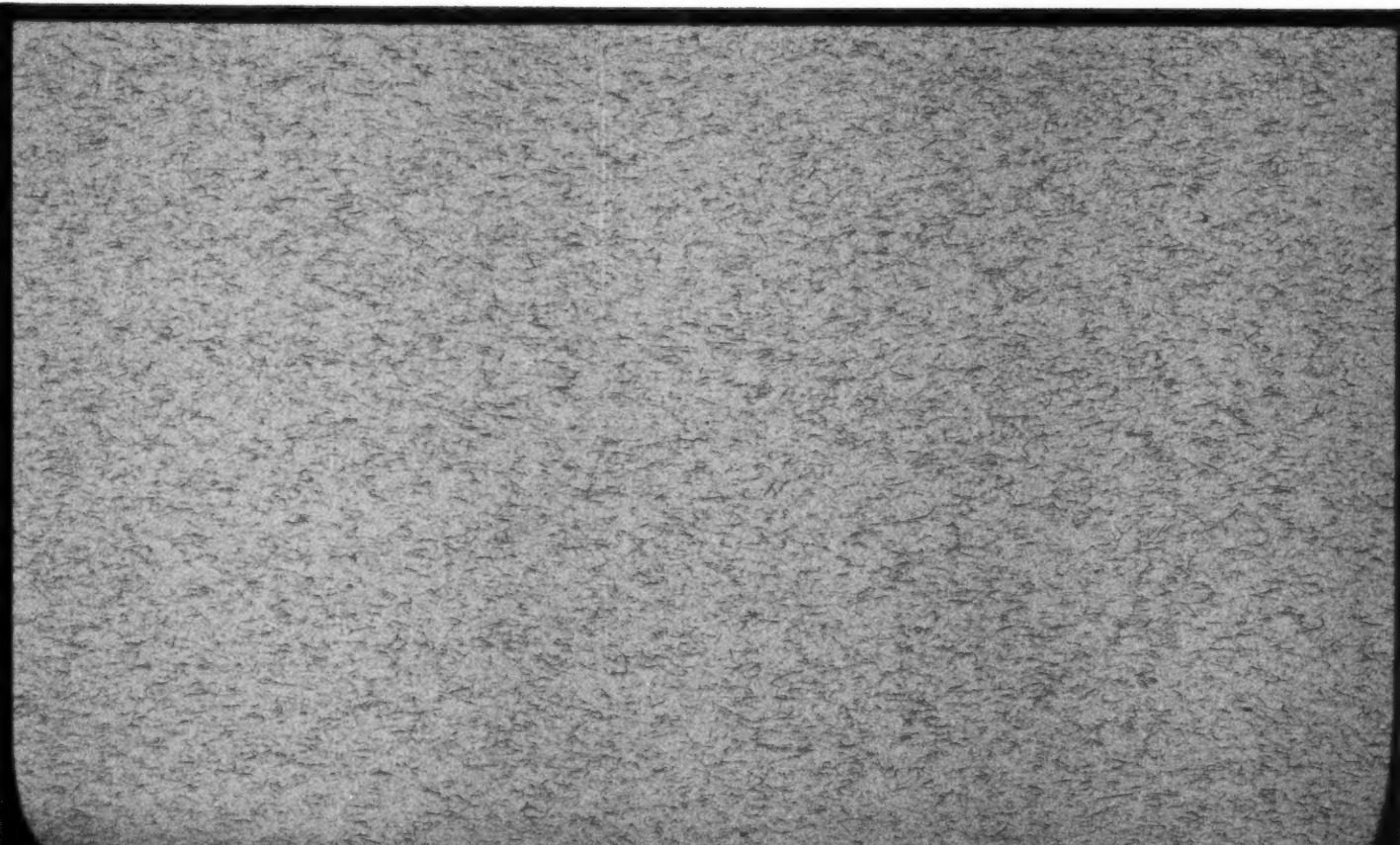

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LETTIE M. McGOLDRICK,
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v.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,
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BRIEF OF RESPONDENT THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI AND AFFIDAVIT OPPOSING MOTION TO PROCEED IN FORMA PAUPERIS.

STATEMENT.

The statement of the case by the Circuit Court of Appeals in its opinion (121 F. 2d, Adv. Sheets No. 4, page 746; R. 38) is sufficient.

ARGUMENT.

For convenience in referring to petitioner's argument and our answer thereto on any particular point, we have used the same grouping as set forth in petitioner's brief.

POINT I.

THE DISTRICT COURT HAD JURISDICTION OF THE PETITIONER AND HER PROPERTY.

Lettie McGoldrick voluntarily entered the Bankruptcy Court and consented to its jurisdiction in signing the petition asking that she be adjudged bankrupt, and in petitioning the court for a four-year extension of the stay order. (R. 4, 11.) Lack of jurisdiction by reason of her failure to join in the original debtor's petition was not raised in the District Court nor the Circuit Court of Appeals.

> 21 *C. J. S.*, Par. 109, p. 163; Par. 110, p. 167;
>
> 15 *C. J.*, Par. 164, p. 844;
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> *U. S. v. Edwards* (C. C. A. 8) 23 Fed. (2d) 477;
>
> *United States v. Kiles* (C. C. A. 8) 70 Fed. (2d) 880.

Under Section 17-303 Oregon Code, the only interest Mrs. McGoldrick, as the surviving widow, would have in this property after joining in the execution of the mortgage, would be with respect to any surplus remaining after the premises were sold at judicial sale.

> 11 *U. S. C. A.*, Sec. 11:
>
> "Bankruptcy courts have jurisdiction to * * *
>
> (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except

as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest."

Taylor v. Voss, 271 U. S. 176; 70 L. Ed. 175; 46 S. Ct. 461;

Nelson v. Dunn (215 Ky., 292), 284 S. W. 1084.

Title to the bankrupts' estate vested in the trustee at the time of his appointment and qualification, and related back to the date of adjudication. The Bankruptcy Court had jurisdiction to fully administer the bankrupt estate, notwithstanding the decease of Henry McGoldrick.

Remington on Bankruptcy (4th Ed.), Vol. 1, Sec. 102;

8 *C. J. S.,* page 1389, Sec. 508;

U. S. C. A., Title 11, Sec. 26;

Derby v. Newton, 142 Ore. 427, 432; 20 P. (2d) 439.

POINT II.

LACK OF APPRAISAL NOT JURISDICTIONAL AND QUESTION NOT PRESENTED TO REFEREE OR DISTRICT COURT.

Lack of appraisal was not assigned as one of the errors on appeal to the Circuit Court of Appeals, and this question was raised for the first time in oral argument. The sale was not objected to by reason of any

lack of appraisal, nor was this matter called to the attention of the trial court. Mrs. McGoldrick approved and adopted the appraisement previously made, which was also accepted by the court as the appraised value of the property. 121 Fed. (2d) Adv. Sheets No. 4, page 746 (R. 4, 11, 44).

Remington on Bankruptcy (4th Ed.), Vol. 6, Sec. 2523;

Robertson v. Howard, 229 U. S. 254; 57 L. Ed. 1174; 33 S. Ct. 854;

Wright v. Union Central Life Insurance Co., 311 U. S. 273; 85 L. Ed. Adv. Sheets No. 3, page 166; 61 S. Ct. 196.

Assuming that there was an irregularity in the procedure by not re-appraising the property in the bankruptcy proceedings, petitioner, by acquiescing therein, is estopped from objecting thereto.

In re Ostlind Mfg. Co. (James Alger Fee, D. J.), 19 Fed. Supp. 836.

Lack of appraisal is merely an irregularity and does not go to the jurisdiction of the court to confirm the sale.

The bankrupt farm debtors petitioned the Conciliation Commissioner for and secured an order to retain possession of the farm for three years from August 31, 1936, at an annual rental of $1,750.00 cash, and staying foreclosure proceedings for a period of three years. (R. 5.) At the end of three years, the sale was ordered by the United States District Judge. (R. 8,

9.) The bankrupts applied to the United States District Court for a four-year additional stay. She is estopped to deny jurisdiction of the court to order the sale.

Warren v. Security-First National Bank (C. C. A. 9) 121 Fed. (2d) 822, 826;

21 *C. J. S.*, "Courts," Sec. 108, page 161.

Objection to the jurisdiction of the United States District Court was waived by her voluntary appearance. (R. 4.)

Phillips v. Baker (C. C. A. 9) 121 Fed. (2d) 752, 754;

21 *C. J. S.*, "Courts," Sec. 109, p. 166;

8 *C. J. S.*, "Bankruptcy," Sec. 30, p. 457.

The general rule that the appellate court will not consider questions not raised in the lower court is applicable in appeals in proceedings under Section 75. 11 *U. S. C. A.*, 203.

Remington on Bankruptcy (4th Ed.), Vol. 10, Sec. 4062;

In re Denney (7th Circuit) 99 Fed. (2d) 712.

The contention that the property was not appraised was not presented to the referee or the lower court nor found in the assignments of error, and therefore is not reviewable on appeal.

Van Huffel v. Harkelrode, 284 U. S. 225; 76 L. Ed. 256;

In re Grosse (7th Circuit) 24 Fed. (2d) 305;

In re Yost and Cook (6th Circuit) 75 Fed. (2d) 614;

In re Schulte-United, Inc. (8th Circuit) 59 Fed. (2d) 553;

8 *C. J. S.*, Sec. 611, p. 1623.

POINT III.

NO APPEAL WAS TAKEN FROM ORDER OF SALE AND NO APPEAL TAKEN FROM ORDER DENYING ADDITIONAL EXTENSION OF STAY PERIOD.

The order of sale was entered on January 31, 1940, and the only appeal taken in connection with this phase of the litigation was from the order confirming the sale entered May 7, 1940. (R. 22.) Likewise, no appeal was taken from the order entered by the District Court on August 26, 1939, denying the petitioner an extension of the stay period beyond the three years ending November 13, 1939. (R. 6.) Thereafter a petition was filed for a four-year extension, and it is from the order denying this further petition that an appeal was taken. (R. 11, R. 16, 17.)

It is fundamental that an order made in a proceeding in bankruptcy may be reviewed by the appellate court only on an appeal from it, and not on appeal taken from a subsequent order after the time allowed for appeal from the former order has expired.

Remington on Bankruptcy (4th Ed.), Vol. 8, Sec. 3815;

In re Irving-Austin Building Corp. (C. C. A. 7) 96 Fed. (2d) 905;

In re Foreman Trust & Savings Bank (C. C. A. 7) 85 Fed. (2d) 942;

Marcy v. Miller (C. C. A. 10) 95 Fed. (2d) 611;

In re Fontana Mercantile Co. et al. v. Casey, (C. C. A. 9) 62 Fed. (2d) 1047.

The principle established by the case of *Turner v. Farmers Loan & Trust Co.,* 106 U. S. 552, 27 L. Ed. 273, namely that where an appeal is taken only from an order confirming sale, errors inhering in the order of sale will not be examined, is in accord with the rules of civil procedure. This case has been cited with approval by the following authorities and cases:

4 *C. J.,* Par. 2587, page 689, Note 76;

Mootry v. Grayson, 9th Circuit (Judge Morrow, 1900) 104 Fed. 613, at 617;

Totten v. Harlowe (U. S. Court of Appeals, Dist. of Columbia) 108 Fed. (2d) 8, at 10;

People of Puerto Rico v. Bank of Nova Scotia (1st Circuit) 116 Fed. (2d) 379;

Thomas v. Central Hanover Bank (U. S. Court of Appeals, Dist. of Columbia) 75 Fed. (2d) 227, at 230.

The appellate procedure with respect to bankruptcy cases does not differ fundamentally from appeals in law and equity cases. The Circuit Court of Appeals is not a bankruptcy court and its jurisdiction in bankruptcy proceedings is purely appellate.

General Order XXXVI;

8 *C. J. S.*, Sec. 19, p. 426;

8 *C. J. S.*, Sec. 625, p. 1645;

Amick v. Columbia Casualty Co. (C. C. A. 8) 101 Fed. (2d) 984.

There is no conflict between the decision of the Circuit Court of Appeals in the case under consideration and the decision in the case of *Borchard v. California Bank,* 310 U. S. 311, 84 L. Ed. 1222. In the *Borchard* case no stay order was entered, and the creditor sought to sell its security without giving the debtor the three-year stay period within which to rehabilitate himself, while in the case at hand, at the request of the farm debtor, a stay order was entered and the order of sale was not entered until long after the three-year period had expired. (R. 7.) It is to be noted that the appeal in the *Borchard* case was from the order authorizing the secured creditor to foreclose or sell under its trust deed.

Borchard v. California Bank, 107 Fed. (2) 96.

In the case of *Wright v. Union Central Life Insurance Co.,* 311 U. S. 273, 85 L. Ed. Adv. Sheets No. 3, page 166, 61 S. Ct. 196, the question was whether the debtor must be accorded an opportunity on his request to redeem the property at the re-appraised value, or at a value fixed by the court before the court may order a public sale. In the *Wright* case the debtor appealed from the order of sale entered prior to the expiration of the three-year stay period.

Wright v. Union Central Life Ins. Co., 108 Fed. (2d) 361.

Petitioner made no request to redeem the property. In fact, confessed her inability to effect a redemption. (R. 16.)

POINT IV.

NO CONFLICT IN DECISIONS.

The opinion of the Circuit Court is not in conflict with the decisions of the other United States Circuit Courts, and there is no doubt as to the meaning of the principle established by the case of *Wright v. Union Central Life Insurance Co., supra,* namely, that the right of the debtor to redeem the property is superior to the right of the creditor to acquire the property at public sale.

Both parties to this proceeding, including the District Court, adopted the appraisal made in the conciliation proceedings. Apparently this appraisal was made with considerable care and set forth with considerable detail. Petitioner accepted this appraisal, and also accepted all of the benefits of the three-year stay period. (R. 4, 11, 13, 16, 23.)

We do not question the absolute right of the petitioner to take the property at the value established by the court as provided by statute, but the petitioner here confessed her inability to so acquire the property, and endeavored to secure a further moratorium of four years. (R. 11, 16.)

POINT V.

PROCEDURE UNDER 75 (s) OF THE BANKRUPTCY ACT HAS BEEN DEFINITELY ESTABLISHED.

All important questions of procedure and administration have now been definitely established by the decisions of the Supreme Court, referring particularly to the *Borchard* case and the *Wright* case, *supra.*

The petitioner is not in position to object to the fact that the petition for sale was filed with the court rather than with the Conciliation Commissioner. Her petition for a four-year additional stay order was filed with the United States District Court, and she recognized the jurisdiction of the United States District Court over the subject matter by endeavoring to invoke relief from this source. (R. 11.) Petitioner made no objection to the jurisdiction of the court, and made no motion to have the matter referred to the Referee, and, as stated above, she herself petitioned the court for relief.

> *Warren v. Security First National Bank,* (C. C. A. 9) 121 Fed. (2d) 822.

The court, having jurisdiction of bankruptcy matters had jurisdiction of the subject matter and jurisdiction of petitioner by her voluntary appearance therein.

> *Phillips v. Baker* (C. C. A. 9) 121 Fed. (2d) 752;

Re Ostlind Mfg. Co. (James Alger Fee, D. J.) 19 Fed. Supp. 836;

21 *C. J. S.*, "Courts," Sec. 109, page 166;

8 *C. J. S.*, "Bankruptcy," Sec. 30, page 457.

Respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

PHILIP S. BROOKE,

E. D. WELLER,

C. R. EBERHARD,

Attorneys for Respondent, The Equitable Life Assurance Society of the United States

IN THE SUPREME COURT OF THE UNITED STATES

LETTIE M. McGOLDRICK,
Petitioner,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,
Respondent.

AFFIDAVIT OPPOSING MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF WASHINGTON,
COUNTY OF SPOKANE, } ss.

I, Philip S. Brooke, being first duly sworn on oath, depose and say: That I am counsel for The Equitable Life Assurance Society of the United States, a corporation, Respondent above named, and make this affidavit for and in its behalf;

That in 1927 The Equitable Life Assurance Society of the United States loaned to Henry McGoldrick, since deceased, and his wife, Lettie M. McGoldrick, the sum of $25,000.00 secured by a first mortgage upon approximately 550 acres of tillable farm land situated in Union County, Oregon; that thereafter on the 7th day of February, 1936, the mortgagors being in default pursuant to the terms of said mortgage, respondent instituted foreclosure proceedings in the Circuit Court of the State of Oregon in and for the County

of Union, at which time there was due and owing on said mortgage approximately $34,566.92.

That on or about April 1, 1936, Henry McGoldrick and Lettie M. McGoldrick filed a joint amended petition under Section 75(s) of the Bankruptcy Act, Title 11, U. S. C. A. Section 203(s), asking to be adjudged bankrupt, and there were so declared.

Respondent by order entered August 31, 1936, was restrained from proceeding further with said foreclosure action for a period of three years, and the farmer-bankrupts were permitted to retain possession of the mortgaged premises upon the payment of an annual rental of $1,750.00 to the respondent, which rental was paid for the years 1936, 1937, 1938 and 1939. That since the death of Henry McGoldrick in 1937, Lettie M. McGoldrick has continued to occupy said farm, but has failed and refused to pay rental for the use of said premises for the years 1940 and 1941, during all of which time she has produced substantial crops upon said land and converted the same to her own use.

That I have investigated and caused to be investigated the crops produced upon the mortgaged premises for the years 1940 and 1941; that I am informed and believe, and therefore allege, that in the year 1940, approximately 4,000 bushels of wheat were produced on said farm, of a value in excess of $2,000.00, and that the wheat was sold for more than $2,000.00; that in addition to said wheat crop, there were crops of

oats and barley of some value, and also a large quantity of hay produced thereon. That in the year 1941 approximately 2,600 bushels of wheat were produced on said farm, of a value in excess of $2,300.00, and that said wheat can be sold, or has been sold, for more than $2,300.00; that in addition to said wheat crop, there were crops of oats and barley of some value and also a quantity of hay produced.

That from the proceeds of said crops of 1940 and 1941 said bankrupt paid no taxes, interest upon the mortgage indebtedness, or rent to respondent, and is in default on account of said rental for the years 1940 and 1941.

That said farm debtor has failed to comply with an order entered by the Conciliation Commissioner on the 29th day of January, 1941, requiring her to pay the rental of $1,750.00 for the year 1940 within ten days days from the date of said order. That a certified copy of said order is herewith lodged with the Clerk of the above entitled Court, and a copy, identified as Exhibit "A," annexed to this affidavit and made a part hereof.

That affiant herewith files with the Clerk of the above entitled Court an affidavit and certificate of George H. Currey, Conciliation Commissioner, certifying that no rental has been paid to him for the years 1940 and 1941; that a copy of said affidavit and certificate, identified as Exhibit "B," is annexed hereto and made a part of this affidavit.

That an action was instituted by respondent in the Circuit Court of Union County, Oregon, against said Lettie M. McGoldrick to recover possession of said premises, and also rental for the years 1940 and 1941, in which action a temporary injunction was issued restraining said farm debtor from disposing of the 1941 crops; that said temporary restraining order was dissolved on September 30, 1941; that a certified copy of said order is herewith lodged with the Clerk of the above entitled Court, and a copy, identified as Exhibit "C," is annexed to this affidavit and made a part hereof.

That affiant is informed and believes, and therefore alleges, that said Lettie M. McGoldrick has sufficient resources available for the costs of prosecuting this appeal.

PHILIP S. BROOKE.

Subscribed and sworn to before me this 27th day of October, 1941.

FRED W. GILBERT,
Notary Public in and for the State of Washington, residing at Spokane, Washington

(Notarial Seal)

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

At LaGrande in said District, before Geo. H. Currey, Conciliation Commissioner

IN THE MATTER OF

HENRY McGOLDRICK AND LETTIE M. McGOLDRICK, Farm Debtors and Bankrupts	In Bankruptcy B-20452

ORDER AFTER HEARING ON PETITION OF THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES FOR A SHOW CAUSE ORDER ON THE PAYMENT OF 1940 CASH RENT.

Now, on this 29th day of January, 1941, there came on before the above entitled Court for consideration the petition of The Equitable Life Assurance Society of the United States filed by the undersigned, Conciliation Commissioner, on December 5, 1940, together with a subsequent motion of the above named Lettie M. McGoldrick for a continuance on the ground that the cause is now on appeal before the United States Circuit Court of Appeals at San Francisco and the regularity of certain proceedings heretofore had in this cause is involved in said appeal and alleging that any decree or order made herein would possibly become a nullity as a result of the appellate court's decision, which motion was supported by affidavits filed

by her attorneys E. R. Ringo and Tyson Kinsell and opposed by an affidavit of Philip S. Brooke, an attorney for the petitioning first mortgage creditor. On said hearing the said Equitable Society was represented by one of its attorneys Colon R. Eberhard and the said Lettie M. McGoldrick was represented by E. R. Ringo, one of her attorneys. Upon due consideration of the arguments presented and the records and files in this cause subsequent to the filing of said first mentioned petition, the Court finds and orders:

(1) That no cause has been shown by the farm debtor and bankrupt, Lettie M. McGoldrick, as to why she should not be required to pay the $1,750.00 cash rental for the year 1940 within 10 days from date as ordered by this Court on the 31st day of August, 1936, in the two orders set forth in the petitioner's verified petition (and also on file in the records of this Court) and that her said motion as to said finding lacks merit and should be denied.

(2) That the remaining portion of the prayer of said Equitable Society's petition need not be, nor is it now, passed upon but is continued for further consideration;

WHEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED that the farm debtor and bankrupt, Lettie M. McGoldrick be, and she is hereby, required to pay into Court the sum of Seventeen Hundred and Fifty and no/100 Dollars ($1,750.00) as cash rental of the farm for the year 1940 within 10 days from the date hereof and that

all other matters prayed for in said petition be continued until the further order of the Court.

Done and dated at LaGrande, Oregon, this 29th day of January, 1941.

(S) GEO. H. CURREY,
Conciliation Commissioner

UNITED STATES OF AMERICA,
DISTRICT OF OREGON,
COUNTY OF UNION, } ss.

I, Geo. H. Currey, Conciliation Commissioner for Union County, Oregon, do hereby certify that the foregoing copy of "Order after hearing on petition of The Equitable Life Assurance Society of the United States for a show cause order on the payment of 1940 cash rent," in the matter of Henry McGoldrick and Lettie M. McGoldrick, farm debtors and bankrupts, Cause No. B-20452, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand at LaGrande, Oregon, this 27th day of October, 1941.

GEO. H. CURREY,
Conciliation Commissioner

EXHIBIT "B"

AFFIDAVIT AND CERTIFICATE IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISRICT OF OREGON

IN THE MATTER OF

HENRY McGOLDRICK AND
LETTIE MAY McGOLDRICK,
Farm Debtors

B-20452

UNITED STATES OF AMERICA,
STATE OF OREGON,
COUNTY OF UNION,
ss.

I, the undersigned Geo. H. Currey, do hereby certify and state:

That I am and have been for the past seven years the duly appointed, qualified and acting Conciliation Commissioner for Union County, Oregon, under appointment of the United States District Court for the District of Oregon; that I am the Conciliation Commissioner who conducted the proceedings in the above entitled matter since the 23rd day of April, 1936, on which date the said Henry McGoldrick and Lettie May McGoldrick were adjudged bankrupts and the proceedings referred to me. That on behalf of the bankrupts there has been paid to me the annual cash rental of $1,750.00 for the years 1936, 1937, 1938 and 1939.

That no rental payments have been made to me for the years 1940 and 1941.

GEO. H. CURREY,

Subscribed and sworn to before me this 23rd day of October, 1941.

ANNETTA JOHNSON,

Notary Public for Oregon.

My commission expires April 16, 1943.

EXHIBIT "C"

BE IT REMEMBERED, that a regular term of the Circuit Court of the State of Oregon, for the County of Union begun and held at the Court House in the City of LaGrande, in said County and State, on Monday, the 2nd day of June, A. D., 1941, the same being the first Monday of said month and the time fixed by law for holding a regular term of said Court, when were present:

The Honorable R. J. GREEN, Judge Presiding

GEO. L. ANDERSON, Jr., District Attorney

C. K. McCORMICK, Clerk

JESSE BRESHEARS, Sheriff

When, on Tuesday, the 30th day of September, A. D., 1941, or the 59th Judicial Day of said term, among others, the following proceedings were had, to-wit:

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES, *Plaintiff*,

v.

LETTIE M. McGOLDRICK, a widow,
AND EUGENE McGOLDRICK AND
LOIS B. McGOLDRICK, husband and wife, *Defendants*.

This cause came on for hearing on motion of defendants for an order of court quashing the temporary injunction heretofore issued herein. Plaintiff appeared by Colon R. Eberhard, Esq., its counsel and defendants appeared by their counsel. The matter was presented to the court by argument of the respective counsel and thereupon submitted to the court for determination. The Court having fully considered the matter and now being fully advised in the premises, allows said motion.

It is therefore CONSIDERED, ORDERED AND DECREED that said motion be and the same hereby is allowed and the temporary injunction heretofore issued herein be and the same hereby is dissolved.

(Signed) R. J. GREEN, Circuit Judge.

STATE OF OREGON, }
COUNTY OF UNION, } ss.

I, C. K. McCormick, County Clerk and Ex-Officio Clerk of the Circuit Court of Union County, State of Oregon, do hereby certify that the foregoing copy of order dissolving temporary injunction in the case of

Equitable Life Assurance Society v. Lettie M. McGoldrick, et al., has been compared by me with the original, and it is a correct transcript therefrom, and of the whole of such original order as the same appears of record in my office and in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 23rd day of October, A. D., 1941.

C. K. McCORMICK, County Clerk

By C. L. GRAHAM, Deputy

WHEREFORE Respondent respectfully prays that the motion to proceed in forma pauperis be denied.

PHILIP S. BROOKE,
E. D. WELLER,
C. R. EBERHARD,
Attorneys for Respondent
The Equitable Life Assurance Society of the United States.